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No.——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES J. BELCHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

LAUREL W. MARC-CHARLES
Counsel of Record
825 South Bayshore Drive
Tower III, Suite 1748
Miami, Florida 33131
(305) 374-6688

DAVID S. BOWMAN
TAYLOR, BRION, BUKER & GREENE
Barnett Bank Plaza 7th Floor
One East Broward Boulevard
Fort Lauderdale, Florida 33301
(305) 522-6700

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Title 31 U.S.C. 5313, *et seq.* and the enabling regulations in effect in 1987, and before the 1989 revisions, obligate a bank to identify in Part II of Internal Revenue Service Form 4789 the true source of reportable funds; and, if the true source is not identified, whether a bank customer is criminally liable for having caused the bank to file a false report.

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your Petitioner, James J. Belcher, prays that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review its decision entered on April 2, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 927 F.2d 1182.[1] See Appendix A attached hereto. The Order of Dismissal of

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[1] The parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

the District Court dated October 20, 1989, is unreported. See Appendix B, attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 2, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title 31 U.S.C. 5313, provides in pertinent part:

   A. Section 5313(a):

   > When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

2. Title 31 U.S.C. 5324 provides in pertinent part:

   A. Section 5324(2):

   > No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
   >
   > (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; * * *

3. Title 18 U.S.C. § 1001 provides:

> Section 1001. Statements or entries generally
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

4. Title 31 C.F.R. 102.22, the enabling regulation in force at the time of the events herein, provides in pertinent part:

> A. Section 103.22(a)(1):
>
> Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer by, through, or to such financial institution which involves a transaction in currency of more than $10,000.

5. Title 31 C.F.R. 103.26, during the period of time herein, provided in pertinent part:

> A. Section 103.26(a)(1):
>
> A report required by 103.22(a) shall be filed by the financial institution within 15 days following the day on which the reportable transaction occurred.
>
> B. Section 103.26(a)(3):
>
> A copy of each report filed pursuant to 103.22 shall be retained by the financial institution for a period of five years from the date of the report.

C. Section 103.26(a)(4):

All reports required to be filed by 103.22 shall be filed with the Commisisoner of Internal Revenue, unless otherwise specified.

D. Section 103.26(d):

Reports required by 103.22, 103.23 or 103.24 shall be filed on forms prescribed by the Secretary. All information called for in such forms shall be furnished.

E. Section 103.26(e):

Forms to be used in making the reports required by 103.22 and 103.24 may be obtained from the Internal Revenue Service. * * *

6. Title 31 C.F.R. 103.27, during the period of time herein, provided in pertinent part:

Before effecting any transaction with respect to which a report is required under paragraph (a) of 103.22, a financial institution shall verify and record the name and address of the individual presenting a transaction, as well as record the identity, account number, and the social security or tax payer identification number, if any, of any person or entity for whose or which account such transaction is to be effected. * * *

STATEMENT OF THE CASE

On four occasions (March 25, 1987; April 16, 1987; April 29, 1987; and June 3, 1987), Petitioner, an attorney, was presented with cash from a client[2] in excess of $10,000 ($36,000; $40,000; $40,000; and $50,000, respectively). On each occasion, the total amount of cash was deposited into Petitioner's trust account and a trust

[2] The client unbeknownst to Petitioner, was an undercover IRS agent.

account check in the same amount was written to one of two corporations incorporated by Petitioner for the client. On each occasion, Petitioner handed the trust account check to the client for ultimate deposit.

On each occasion the bank, when presented with cash, prepared and filed a cash transaction report ("CTR"). Although each CTR was prepared by different tellers at different times, each of the four CTRs contain exactly the same information: that the Petitioner, James J. Belcher, was the individual "who conducted this transaction with the financial institution" (Part I of Form 4789); and that the "individual or organization for whom this transaction was completed" (Part II of Form 4789) was James J. Belcher P.A. Trust Account.

The initial indictment was issued against Petitioner and his wholly-owned professional association upon the same facts recited above in Case No. 87-6133-CR-Paine. After extensive briefing on Omnibus Motions to Dismiss, and while the same was pending before the district court, the government moved to dismiss the indictment without prejudice.

The instant indictment was returned against the individual Petitioner alone approximately a year and a half later. The instant indictment increases the number of counts against Petitioner from five to twelve. A copy of the instant indictment appears below as Appendix C.[3]

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[3] The initial indictment alleged Bank Secrecy Act violations pursuant to Title 31 U.S.C., Sections 5313, 5322 and 5324 concerning the filing of CTRs, and a conspiracy count alleging that Petitioner conspired with his wholly-owned professional association in committing the alleged substantive offense.

The instant indictment contains three counts as to each of the four CTRs, charging as to each: (1) a violation of section 5313, causing a bank to file a false CTR (Counts I, IV, X); (2) a violation of section 5324, structuring a transaction to cause the bank to file a false CTR (Counts II, VII, XI); and (3) a violation of Title 18 U.S.C. 1001, making a material omission of fact (Counts III, VIII, IX, XII).

Petitioner again moved to dismiss the instant indictment for failure to state an offense. By order of the District Court, Petitioner's motion to dismiss was granted, the Court finding that the indictment failed to state an offense, and the indictment thus was dismissed with prejudice, upon the authority of *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987); *United States v. Bucey*, 876 F.2d 1297 (7th Cir. 1989); and *United States v. Gimbel*, 632 F. Supp. 713 (E.D. Wis. 1984), *rev'd on other grounds*, 830 F2d 621 (7th Cir. 1987). A copy of the District Court's Order of Dismissal appears as Appendix B.

In dismissing the indictment for failure to state a crime, the District Court determined that a theory of criminal liability grounded on the premise that Part II of Form 4789 requires the bank to disclose the "true party in interest" or the "source of funds" is insufficient to state a crime under Title 31 U.S.C. 5313, *et seq. Belcher*, *supra*, 13. On appeal by the United States, the Eleventh Circuit reversed. *See United States v. Belcher*, 927 F.2d 1182 (11th Cir. 1991), a copy of which appears as Appendix A. The Eleventh Circuit held that financial institutions had a duty, under the applicable regulations, "to disclose the real party in interest" on its CTR, and that Petitioner could be held criminally liable for failing to provide this information.[4]

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[4] The Eleventh Circuit, although acknowledging law to the contrary in other Circuits, claimed that law inapplicable because the CTR form filled out in the instant case had been amended since the other cases were decided. The changes in the form are negligible, and do not alter the applicability of *Murphy, Bucey* and *Gimbel* to the facts in this case.

REASONS FOR GRANTING THE PETITION

The instant petition should be granted because the decision of the Eleventh Circuit threatens Petitioner, a lawyer, with incarceration for conduct not proscribed by the Bank Secrecy Act and the regulations promulgated thereunder.

The Eleventh Circuit's decision in this case conflicts with the decision of the Seventh Circuit in *Bucey* and the Ninth Circuit in *Murphy*. In both *Bucey* and *Murphy*, the Seventh and Ninth Circuits addressed the precise issue of the scope of the reporting requirement in Part II of Form 4789 and determined that the form does not require disclosure of the true source of the funds. *Bucey*, 876 F.2d at 1308-09; *Murphy*, 809 F.2d 1430. Prior to the instant decision, the Eleventh Circuit had not ruled on this narrow issue.

In *California Bankers Association v. Schultz*, 416 U.S. 21, 26 (1974), this Court determined that the civil and criminal penalties of the Bank Secrecy Act attach only upon violation of the *regulations* promulgated by the secretary of the Treasury. The Act is not self-executing and the regulations in effect at the times pertinent hereto did not expressly require disclosure of the true source of reportable funds.

Guided by this mandate, large numbers of indictments charging violations of the Act's reporting requirements have been found invalid and dismissed through the Circuits. *See e.g., United States v. Denemark*, 799 F.2d 1559 (11th Cir. 1986) (reversing conviction where defendant conducted 14 different transactions with 14 different banks to prevent banks from being required to file a CTR); *United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988) (reversing conviction for structuring transactions to avoid having bank file CTR); *United States v. Anzalone*, 765 F.2d 676 (1st Cir. 1985) (reversing conviction for causing bank to fail to file CTR); *United*

States v. Larson, 796 F.2d 244 (8th Cir. 1986) (reversing conviction because imposing duty on bank customers under statutes and regulations in force would violate due process); *see also, United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Riky*, 669 F. Supp. 196 (N.D. Ill. 1987); *United States v. Gimbel*, 632 F. Supp. 713 (E.D. Wis. 1985) *rev'd on other grounds*, 830 F.2d 621 (7th Cir. 1987).

The number of indictments dismissed and convictions reversed for failure to state an offense under the Bank Secrecy Act dramatically underscores the necessity for carefully examining the indictment in this case. Pursuant to this Court's mandate in *California Bankers*, this examination must begin by determining what the regulations in effect at the time herein prohibit and must end by reconciling the conflict in the Circuits that threatens Petitioner's freedom.

In conclusion, this Petition should be granted and the conflict with the Circuits reconciled in order to protect Petitioner's right to due process. It violates every man's right to due process if he is "forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 101, 112 (1979). The Eleventh Circuit's expansive interpretation of the Bank Secrecy Act's reporting requirements ignores the simple fact that the Secretary of the Treasury had not, in 1987, proscribed the conduct upon which the indictment against Petitioner is based. The Eleventh Circuit's extension of criminal liability beyond the plain reading of the regulations, places Petitioner at peril, in violation of his due process rights.

CONCLUSION

For the above and foregoing reasons, this Court ought to grant certiorari, and review and reverse the Eleventh Circuit's decision herein.

Respectfully submitted,

LAUREL W. MARC-CHARLES
Counsel of Record
825 South Bayshore Drive
Tower III, Suite 1748
Miami, Florida 33131
(305) 374-6688

DAVID S. BOWMAN
TAYLOR, BRION, BUKER & GREENE
Barnett Bank Plaza 7th Floor
One East Broward Boulevard
Fort Lauderdale, Florida 33301
(305) 522-6700

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-6223

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JAMES J. BELCHER,
Defendant-Appellee.

April 2, 1991

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, FAY, Circuit Judge, and HOFFMAN*, Senior District Judge.

TJOFLAT, Chief Judge:

The Bank Secrecy Act (the Act), 31 U.S.C. §§ 5313-5326 (1988), authorizes the Secretary of the Treasury to issue regulations requiring domestic financial institutions to report currency transactions in which they are engaged. Exercising this authority, the Secretary has promulgated a regulation requiring such institutions to report to the Internal Revenue Service (IRS) currency transactions involving over $10,000. 31 C.F.R. § 103.22 (a) (1990). In this case, a grand jury in the Southern District of Florida indicted a lawyer for deliberately

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* Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

failing to identify the party for whom he made deposits to his law firm's trust account at a domestic bank. According to the grand jury's indictment, such failure caused the bank to make false statements or material omissions in its currency transaction reports (CTRs) to the IRS and rendered the lawyer criminally liable. The district court, concluding that the grand jury failed to charge a crime, dismissed the indictment, and the Government appealed.[1] We reverse.

I.

The indictment alleges that in March 1987, Ron Caston, an undercover IRS agent, asked an attorney, James J. Belcher, the appellee, to launder some United States currency in order to conceal his ownership thereof. Belcher agreed to do this.

According to the indictment, Belcher laundered Caston's money in the following manner. First, Belcher formed two Florida corporations, Belcher Corp. One, Inc., and Belchercorp Two, Inc.; he made Caston the sole shareholder and director of these corporations. Then, on four separate occasions, Belcher deposited Caston's money into his law firm's trust account, the James J. Belcher, P.A. Trust Account, at the First Union National Bank of Florida (First Union) in Pompano Beach. After each of these deposits, Belcher drew checks on the trust account, in sums equaling the amount Caston had given him, payable to the two corporations; in turn, Caston deposited the checks in the corporations' bank accounts.

Belcher, between March and June 1987, laundered approximately $166,000 of Caston's money in the manner described above. Throughout this time, Belcher assured Caston that the IRS would not discover that Caston was the true owner of the money. If questioned by the IRS about the source of the deposited money, Belcher planned

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[1] Our jurisdiction to hear the Government's appeal is created by 28 U.S.C. § 1291 (1988) and 18 U.S.C. § 3731 (1988).

to invoke both the attorney-client privilege and his own fifth amendment privilege against self-incrimination.

The four deposits Belcher made to his firm's trust account were each in excess of $10,000. With respect to each deposit, the bank filed a CTR, as required by 31 U.S.C. § 5313(a)[2] and its implementing regulations, based on information provided by Belcher. These CTRs identified Belcher as the individual who conducted the transaction and the James J. Belcher, P.A. Trust Account as the "individual or corporation for whom th[e] transaction was completed"; at no time did Belcher reveal to the bank that he made the deposits for Caston.

The indictment alleged that Belcher deliberately failed to disclose to First Union the identity of the person for whom the deposits were made (i.e., the real party in interest) and that, as a result, the bank prepared and filed with the IRS four separate CTRs which contained material omissions or misstatements of fact. For such failures to disclose, Belcher was charged in four counts with causing a domestic financial institution to file CTRs containing material omissions or misstatements of fact in violation of 31 U.S.C. § 5324(2)[3] and 18 U.S.C. § 2

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[2] 31 U.S.C. § 5313(a) provides:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency . . . in an amount, denomination, or amount and denomination, or under circumstances the Secretary [of the Treasury] prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

[3] 31 U.S.C. § 5324(2) makes it unlawful for a person, for the purpose of evading currency reporting requirements, to "cause or attempt to cause a domestic financial institution to file a [currency transaction] report . . . that contains a material omission or misstatement of fact."

(1988),[4] in four counts with using material omissions or misstatements to cause a domestic financial institution to file incomplete and false CTRs, in violation of 18 U.S.C. § 1001 (1988)[5] and 18 U.S.C. § 2, and in four counts for structuring currency transactions for the purpose of evading reporting requirements, in violation of 31 U.S.C. § 5324(3) (1988)[6] and 18 U.S.C. § 2. Belcher promptly moved the district court to dismiss the indictment for failure to charge a criminal offense, and the court granted the motion.[7]

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[4] 18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[5] 18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[6] 31 U.S.C. § 5324(3) makes it unlawful for a person, for the purpose of evading currency reporting requirements, to "structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions."

[7] The district court assumed that Belcher had been charged with failure to file valid CTRs; it observed that while 31 U.S.C. § 5313(a) allows the Secretary of the Treasury to impose reporting requirements on bank customers, he has not done so; the Secretary has only imposed them on financial institutions. The court further noted that under the regulations, customers have no obligation "to structure their transactions so as to trigger the [financial institution's] reporting requirements."

The court made an erroneous assumption; the indictment does not charge Belcher with failing to file CTRs or with filing false CTRs;

The United States appeals, arguing that the district court erred in holding that the indictment failed to charge Belcher with a crime. It submits that banks, in filing CTRs, are required to reveal the real party in interest. The applicable regulations direct banks to provide all of the information requested by the prescribed CTR form (Form 4789), the form used for Belcher's transactions, it contends, clearly requested the identity of the real party in interest. Thus, Belcher, by concealing the identity of the owner of the funds he deposited, caused First Union to file false CTRs, exposing himself to criminal liability. According to the Government, the district court, in concluding that the CTR form did not ask for the identity of the real party in interest, eroneously relied on cases involving the version of Form 4789 that was revised in December 1982 (December 1982 Form 4789); these cases are inapposite—the form used in Belcher's transactions was the version of Form 4789 that was revised in December 1985 (December 1985 Form 4789).[8]

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rather, it charges him, as indicated in the text *supra*, with causing a bank to file false CTRs. In their briefs, the parties have ignored the district court's reason for dismissing the indictment, and have focused on the question we address: do the several counts of the indictment—by alleging that Belcher deliberately withheld from the bank the identity of the real party in interest in his reportable transactions and thus caused the bank to file false CTRs—state offenses?

Despite the district court's failure to recognize the offenses charged in the indictment, there is no need to remand this case to the district court for reconsideration of its ruling. The district court dismissed the indictment for failure to charge a crime and that ruling is properly before this court. In determining whether any of the counts of the indictment state an offense, we are not restricted to a review of the rationale for the district court's decision.

[8] Additionally, the Government argues that even if the later CTR form does not require the bank to report the real party in interest, the four counts charging Belcher with structuring transactions for the purpose of avoiding reporting requirements should not have

Belcher, in response, acknowledges that the Secretary has the authority to issue regulations imposing reporting requirements. According to him, though, the regulations promulgated by the Secretary do not specifically require domestic banks or their customers to disclose the actual sources of deposited money. Thus, the Government's reliance on Form 4789 is misplaced; the CTR form cannot create requirements not outlined in the regulations themselves. In support of this position, Belcher cites precedent involving the December 1982 Form 4789; these cases, he contends, establish that the Bank Secrecy Act and its applicable regulations do not require the disclosure of the real party in interest to a reportable transaction. Finally, he contends that since a bank is not required to report the real party in interest, it cannot be criminal for a customer to structure a transaction in order to avoid revealing this party to a bank.

We agree with the Government. The regulations governing CTRs state that a financial institution must provide all of the information called for by the CTR form. The form in this case, the December 1985 Form 4789, clearly directs domestic banks to disclose the real party in interest to every reportable transaction. Thus, each count of the indictment alleges facts which, if true, would result in criminal liability for Belcher—i.e., that Belcher deliberately concealed the source of his funds and thus caused the bank to file false CTRs.

II.

Under Federal Rule of Criminal Procedure 12(b),[9] an indictment may be dismissed only if there is an "infirmity

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been dismissed because such offenses do not depend on the filing of a CTR. Our disposition of this case makes it unnecessary for us to resolve this argument.

[9] Fed.R.Crim.P. 12(b) provides, in pertinent part:

> Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised

of law in the prosecution." *United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir.1987); *see also United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir.1977).[10] "On review, this court must reverse a dismissal if it concludes that the factual allegations in the indictment, when viewed in the light most favorable to the government, were sufficient to charge the offenses as a matter of law." *Torkington*, 812 F.2d at 1354. Thus, accepting the allegations of the indictment as true, we must decide whether First Union was required by law to report the real party in interest to Belcher's transactions, and, if so, whether Belcher can be held criminally liable for intentionally concealing the source of his funds.

The Act, as stated above, authorizes the Secretary of the Treasury to promulgate regulations requiring domestic financial institutions to file CTRs describing their transactions. The Act, then, is not self-executing: its criminal penalties attach only after regulations have been promulgated by the Secretary; "if the Secretary were to do nothing, the Act itself would impose no penalties on anyone." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 26, 94 S.Ct. 1494, 1500, 39 L.Ed.2d 812 (1974). The Secretary must establish who, in addition to domestic financial institutions, must file CTRs, which transactions must be reported, and the manner in which this reporting will take place.

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before trial by motion. Motions may be written or oral at the discretion of the judge. The following muset be raised prior to trial:

. . . .

(2) Defenses and objections based on defects in the indictment or information. . . .

[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

The Act's currency reporting requirements are found in 31 U.S.C. § 5313(a).[11] The regulations implementing this section require financial institutions to file CTRs when they participate in transactions involving currency in excess of $10,000. 31 C.F.R. § 103.22(a). Reports are filed on Form 4789, which is prescribed by the Secretary. *Id.* § 103.27(d) (1990). The regulations specify that "all information called for in [the CTR] forms shall be furnished." *Id.* "Thus, Form 4789 rather than section 5313 imposes affirmative duties of disclosure with regard to currency transactions." *United States v. Murphy*, 809 F.2d 1427, 1430 (9th Cir.1987). The question, therefore, is whether Form 4789 required First Union to report the source of Belcher's deposits.

First Union completed and filed with the IRS the December 1985 Form 4789, relying on information provided by Belcher. Part I asks for the "[i]dentity of [the] individual who conducted this transaction with the financial institution." The instructions for Part I state that "[i]f the individual conducts the transaction for another person, be sure to complete Part II also." Part II is, for our purposes, the crucial section of Form 4789. It calls for the identity of the "[i]ndividual or organization for whom this transaction was completed." The instructions for Part II state that "[i]f the individual in Part I is conducting the transaction for himself or herself, do not complete Part II. In all other cases, . . . complete Part II." The first entry in Part II on the December 1985 Form 4789 instructs individuals to indicate if they are conducting transactions involving multiple individuals or organizations and, if so, to read the pertinent instructions. The instructions specifically state that "[i]f this transaction is being conducted for more than one individual or organization, check Box 14, and complete the applicable entries on the back of the form. Do this also if the individual in Part I conducts a transaction that involves

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[11] For the text of section 5313, *see supra* note 1.

both himself or herself and another individual or organization." The remainder of Part II, and its instructions, asks for information concerning the individuals or organizations for whom the transaction was completed, including their names and social security or employer identification numbers.

The December 1985 Form 4789 makes it clear that a bank has a duty to disclose the identity of *all* individuals or organizations involved in a reportable transaction. We find no ambiguity in the language of this form. The indictment in this case charges that Belcher, for the purpose of concealing the source of his funds, intentionally failed to inform the bank of material information causing it to file false CTRs. This conduct, if proven, would subject Belcher to criminal liability as a principal. *See, e.g., United States v. Meros*, 866 F.2d 1304, 1311 (11th Cir.1989) ("actions by a customer that cause a financial institution to abrogate its duty to file a CTR are criminal"); *United States v. Cure*, 804 F.2d 625, 628-29 (11th Cir.1986) (causing financial institution to fail to file CTR is criminal); *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir.1983) (same). Therefore, we conclude that the district court erred in dismissing the indictment in this case.

Belcher relies, as did the district court, on three cases to support the conclusion that none of the counts of the indictment charge Belcher with a crime: *United States v. Bucey*, 876 F.2d 1297 (7th Cir. 1989); *United States v. Murphy*, 809 F.2d 1427 (9th Cir.1987); *United States v. Gimbel*, 632 F.Supp. 713 (E.D.Wis.1984), *rev'd on other grounds*, 830 F.2d 621 (7th Cir. 1987). He contends that these cases support the proposition that domestic banks are only required to disclose information specifically outlined in the regulations governing currency transactions. Since such regulations do not require domestic banks to report the real party in interest to reportable transactions, it is not necessary for a domtsic bank to report

this information. This analysis also leads Belcher to conclude that Form 4789 is irrelevant to determining the reporting requirements of domestic banks; simply put, Belcher argues that Form 4789 is not a regulation and thus does not impose any requirements on domestic banks. We disagree.

Belcher completely ignores the regulations' explicit directive that "all information called for in [the CTR] forms shall be furnished," 31 C.F.R. § 103.27(d); these forms are prescribed by the Secretary of the Treasury, *id.* Thus, Form 4789 has been incorporated into the regulations, and domestic banks must disclose the information requested by the form to comply with the regulations. Indeed, the cases cited by Belcher to support his position begin with the premise that Form 4789 "imposes affirmative duties of disclosure with regard to currency transactions." *Murphy*, 809 F.2d at 1430; *see also Bucey*, 876 F.2d at 1307-09; *Gimbel*, 632 F.Supp. at 722.[12]

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[12] Belcher does not argue that the December 1985 Form 4789 is ineffective because it was not promulgated according to the notice an dcomment procedures of the Administrative Procedure Act, 5 U.S.C. § 553 (1988). Without deciding thc issue, we note that such an argument would likely fail. Section 5313 contemplates that after the Secretary establishes which transactions shall be reported (determined in reference to amount) and who must report them, *all* information concerning reportable transactions, including all parties engaged in them, shall be reported in the manner prescribed by the Secretary. Form 4789, then, does not impose any duties on domestic financial institutions not mandated by statute or regulation; the form simply requests the important details of the transaction.

There is precedent holding that an amendment to Form 4789, imposing a duty upon banks to report multiple currency transactions by one individual amounting to more than $10,000 in a single day, was invalid under the Administrative Procedure Act (the APA). *See United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986) (citing *United States v. Richter*, 610 F.Supp. 480, 489 & n.14 (D.C. Ill. 1985)). That amendment, however, made more transactions reportable, a revision for which Congress specifically required regulation; therefore, to implement that amendment, the Secretary had

Belcher further argues that Form 4789, even if it imposes reporting requirements on banks, does not require disclosure of the information at issue here. He cites cases in which courts that analyzed Form 4789 concluded that domestic banks were not required to report the real party in interest to reportable transactions; accordingly, those courts dismissed charges that bank customers had caused domestic banks to file false or incomplete CTR's. Those cases, however, involved the December *1982* Form 4789.[13] The 1982 and 1985 CTR forms have similar headings for their different parts; for example, Part II for both forms asks for the "[i]ndividual or organization for whom this transaction was completed." But, the December 1982 Form 4789 does not direct banks, on its face or in its instructions, to report the identities of all parties involved in a transaction; instead, the 1982 form provides only enough space for the bank to report the identity of one person or organization other than the party named in Part I, and its instructions are silent as to when Part II should be completed. Because of this lack of direction, the courts in *Bucey*, *Murphy*, and *Gimbel* held that the 1982

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to comply with the notice and comment provisions of the APA. In contrast, the amendments in the present case do not affect the types of transactions that must be reported or the individuals who must file reports. The amendment at issue here merely clarifies banks' duties to disclose all information concerning reportable transactions, including all the parties involved in such transactions. Thus, the Secretary is not subject to the requirements of the APA. *See Murphy*, 809 F.2d at 1430 n.4 (rejecting claim that December 1982 Form 4789 was ineffective because it was not promulgated in accordance with APA directives).

[13] The *Bucey* court did not specifically identify which version of Form 4789 was involved in that case. The transacitons in *Bucey* occurred between January 6, 1986 and February 20, 1986, shortly after the effective date of the December 1985 Form 4789. There is, however, no mention, in either the district court's or court of appeals' decision, of the recent amendments to Form 4789, and the court of appeals cited, for support, cases involving the December 1982 Form 4789. Thus, we presume that the 1982 form was at issue. If *Bucey* did involve the 1985 forms, we will not follow its lead in relying on cases analyzing the 1982 form.

form did not clearly impose a duty on financial institutions to disclose the real party in interest to reportable transactions. *See Bucey*, 878 F.2d at 1308-09; *Murphy*, 809 F.2d at 1431; *Gimbel*, 632 F.Supp. at 727.

Additionally, the general instructions for the December 1982 Form directed financial institutions to report "the identity . . . of the individual or organization *for whose account* the transaction is made." (Emphasis added). This language, according to the *Murphy* court, made it unclear whether the bank was required to report "on whose behalf" the deposit was made or "for whose bank account." Thus, that court concluded that it was unclear whether financial institutions were required to disclose the real parties in interest to reportable transactions. *Murphy*, 809 F.2d at 1431.

The form in this case—the December 1985 Form 4789—does not suffer from the same lack of clarity attributed to the December 1982 Form 4789. As stated above, the 1985 form and its instructions clearly direct financial institutions to report all individuals and organizations for whom a particular reportable currency transaction was completed. The cases relied on by Belcher and the district court simply do not apply to this case; indeed, it appears that Form 4789 was specifically altered to resolve any possible ambiguity in this area.

III.

We conclude that financial institutions have a duty, pursuant to section 5313 and its implementing regulations, to disclose the real party in interest to reportable currency transactions. The indictment in this case charges, in several counts, that Belcher intentionally concealed the source of his funds so that the bank would be unable to report the real party in interest to his transactions. If proved, this would subject Belcher to criminal liability with respect to each count of the indictment. Accordingly, we reverse the order of the district court and remand this case for further proceedings.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-6028-Cr-Paine

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES J. BELCHER,
Defendant.

ORDER OF DISMISSAL

[Filed Oct. 20, 1989]

Before the Court is the motion of the defendant, James J. Belcher, to dismiss the indictment (DE 22). This motion was referred to Magistrate Ann E. Vitunac for review and recommendation by order of this court (DE 26). The Magistrate recommended that the defendant's motions attacking the indictment be denied (DE 38). Objections were filed by the defendant to the Magistrate's Report and Recommendation (DE 42). The undersigned has reviewed *de novo* the 12 count indictment, the omnibus motion to dismiss and the authorities submitted by all parties bearing on the question of whether or not the indictment, in any of its counts, states a crime.

The question presented is a close one. Similar indictments have been reviewed by the appellate courts of this country. These cases have been carefully examined by counsel for the parties in the briefs submitted here. It goes without saying that interpretation of a criminal statute requires strict construction. The statute under

which criminal liability is charged, 31 U.S.C. § 5313 is broad enough to permit the Secretary of the Treasury to impose reporting requirements on customers of institutions as well as upon the institutions themselves. This, however, has not been done. The courts are uniform in recognizing that a duty has been imposed only upon the financial institutions to complete reporting requirements. While cases have held that a customer may aid and abet a financial institution and, thus, become criminally liable for violation of the statute, the accusations of the indictment do not support that conclusion in this case. See *U.S. v. Meros*, 866 F.2d 1304 (11th Cir. 1989). The regulations under the statute impose no obligation upon customers to structure their transactions so as to trigger the reporting requirements of § 5313. *U.S. v. Cure*, 804 F.2d 625 (11th Cir. 1986).

Circuits other than our own, specifically in these cases: *U.S. v. Murphy*, 809 F.2d 1427 (9th Cir. 1987) and *U.S. v. Bucey*, 876 F.2d 1297 (7th Cir. 1989), have concluded that indictments of the sort with which we are confronted here should not be allowed to stand. In addition, a rather thorough analysis of the situation is found in *U.S. v. Gimbel*, F.Supp. 713 (E.D. Wis. 1984). The case holds that allegations of criminal liability resting on a theory that part 2 of the reporting form requires the listing of the "true party in interest" or "source of funds" are insufficient to state an offense under 18 U.S.C. § 1001 or 31 U.S.C. §§ 5313, *et seq.*

For the reasons stated above, the court finds it necessary to disapprove the conclusion and recommendation of the Magistrate.

It is

ORDERED and ADJUDGED that the indictment of the defendant be and the same is hereby dismissed. It is further

ORDERED and ADJUDGED that other pending motions in this case have become moot in the light of the order on defendant's motion to dismiss. The remaining pending motions are, therefore, denied as moot.

DONE and ORDERED at West Palm Beach, Florida this 20th day of October, 1989.

/s/ James C. Paine
United States District Judge

cc: U.S. Attorney
Laurel W. Marc-Charles, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. ———
31 USC 5313(a)
31 USC 5322(b)
31 USC 5324(2)
31 USC 5324(3)
18 USC 1001
18 USC 2
31 CFR 103.22
31 CFR 103.26
31 CFR 103.27

UNITED STATES OF AMERICA

v.

JAMES J. BELCHER

INDICTMENT

INTRODUCTION

1. At all times material here, James J. Belcher, P.A. was a Florida corporation with offices located at 1620 South Federal Highway, Suite 611, Pompano Beach, Florida.

2. At all times material herein, James J. Belcher (somtimes referred to hereinafter as "Belcher") was an attorney at law, licensed to practice law in the State of Florida, and is the president, treasurer and director of James J. Belcher, P.A.

PATTERN OF ILLEGAL ACTIVITY

As part of a pattern of illegal activity, the defendant committed the following acts:

3. Beginning in or about March 1987 and continuing through June 1987, James J. Belcher undertook to "launder" United States currency for an individual identified to him as Ron Caston (hereinafter "Ron Caston"), and others, through a series of monetary transactions at domestic and foreign financial institutions, which Belcher claimed would be virtually untraceable. As set forth in greater detail below, Belcher undertook to deposit said funds into the trust account of his law practice, James J. Belcher, P.A., without disclosing the identities of Ron Caston and other persons and entitites for whom the transactions were being conducted, and then to transfer the funds to nominees for those persons. In all, during the stated period and as a part of the pattern of illegal activity, Belcher laundered approximately one hundred sixty-six thousand dollars ($166,000) in this way.

4. On four separate occasions, James J. Belcher received sums of United States currency in excess of ten thousand dollars ($10,000) from Ron Caston. Belcher then deposited that currency into the trust account of James J. Belcher, P.A. at the First Union National Bank of Florida, Pompano Beach, Florida (hereinafter "First Union National Bank").

5. James J. Belcher deliberately failed to disclose to the First Union National Bank any and all information concerning the identities of Ron Caston and other persons and entities for whom the above-mentioned currency deposits were made. As a result, the First Union National Bank prepared and filed with the Internal Revenue Service four separate Currency Transaction Reports (I.R.S. Form 4789) which contained material omissions and misstatements of fact in Part II, entitled "Individual or organization for whom this transaction was completed."

6. James J. Belcher formed two Florida corporations known as Belcher Corp One, Inc. and Belchercorp Two, Inc., to act as nominees for the true owner or owners of the above-mentioned United States currency. He issued checks from the trust account of James J. Belcher, P.A., which were made payable to the nominee corporations and given to Ron Caston for deposit into the bank accounts of the nominee corporations.

7. James J. Belcher stated to Ron Caston that, if questioned about the source of the above-mentioned currency deposits, he would invoke the attorney-client privilege and his Fifth Amendment privilege against self-incrimination.

8. James J. Belcher stated to Ron Caston that, on behalf of the true owner or owners of the above-mentioned funds, he (Belcher) would conduct and attempt to conduct additional financial transactions with financial institions in foreign countries, designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the funds involved in those financial transactions.

COUNT I

9. On or about March 25, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER

did unlawfully, knowingly and willfully, for the purpose of evading the reporting requirements of Section 5313 (a) of Title 31 of the United States Code, cause and attempt to cause a domestic financial institution, to wit, the First Union National Bank of Florida, Pompano Beach, Florida, to file a Currency Transaction Report with the Internal Revenue Service (I.R.S. Form 4789) for a currency transaction in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, thirty-six thousand dollars ($36,000), which contained

material omissions and misstatements of fact, namely, the Currency Transaction Report (a) omitted all reference to other persons and entities for whom the transaction was completed, and (b) stated that the currency transaction was completed for James J. Belcher, P.A. and not, in whole or in part, for the true owner or owners of the currency; when, in truth and in fact, and as the defendant then and there well knew, the currency transaction was completed, in whole or in part, for other persons and entities, including but not limited to Ron Caston. It is further alleged that the offense set forth in this paragraph was committed by the defendant herein as part of a pattern of illegal activity involving more than one hundred thousand dollars ($100,000) within a twelve month period, which pattern of illegal activity is set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set forth herein.

All in violation of Title 31, United States Code, Sections 5313(a), 5322(b) and 5324(2); Title 18, United States Code, Section 2; Title 31, Code of Federal Regulations (hereinafter "CFR"), Sections 103.22, 103.26 and 103.27.

COUNT II

10. On or about March 25, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER

did unlawfully, knowingly and willfully, for the purpose of evading the reporting requirements of Section 5313(a) of Title 31 of the United States Code, by the means and in the manner set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set forth herein, structure and assist in structuring a transaction with a domestic financial institution, to wit, the First Union National Bank of Florida, Pompano Beach, Florida, in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten

thousand dollar ($10,000), to wit, thirty-six thousand dollars ($36,000). It is further alleged that the offense set forth in this paragraph was committed by the defendant herein as part of a pattern of illegal activity involving more than one hundred thousand dollars ($100,000) within a twelve month period, which pattern of illegal activity is set forth in paragraph 3 through 8 above.

All in violation of Title 31, United States Code, Sections 5322(b) and 5324(3); and Title 18, United States Code, Section 2.

COUNT III

11. On or about March 25, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER,

in a matter within the jurisdiction of the Internal Revenue Service, an agency of the United States, did knowingly and willfully conceal and cover up material facts by a trick, scheme and device, and make false, fraudulent and fictitious statements and representations as to material facts, in that, by the means and in the manner set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set forth herein, the defendant caused and attempted to cause a domestic financial institution, to wit, the First Union National Bank of Florida, Pompano Beach, Florida, to file a Currency Transaction Report with the Internal Revenue Service (I.R.S. Form 4789) for a currency transaction in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, thirty-six thousand dollars ($36,000), which (a) omitted all references to other persons and entities for whom the transaction was completed, and (b) stated that the currency transaction was completed for James J. Belcher, P.A., and not, in whole or in part, for the true owner or owners of the currency;

when, in truth and in fact, and as the defendant then and there well knew, the currency transaction was completed, in whole or in part, for other persons and entities, including but not limited to Ron Caston.

All in violation of Title 18, United States Code, Sections 1001 and 2.

COUNT IV

12. On or about April 16, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER,

did unlawfully, knowingly and willfully, for the purpose of evading the reporting requirements of Section 5313(a) of Title 31 of the United States Code, cause and attempt to cause a domestic financial institution, to wit, the First Union National Bank of Florida, Pompano Beach, Florida, to file a Currency Transaction Report with the Internal Revenue Service (I.R.S. Form 4789) for a currency transaction in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, forty thousand dollars ($40,000), which contained material omissions and misstatements of fact, namely, the Currency Transaction Report (a) omitted all reference to other persons and entities for whom the transaction was completed and (b) stated that the currency transaction was completed for James J. Belcher, P.A. and not, in whole or in part, for the true owner or owners of the currency; when, in truth and in fact, and as the defendant then and there well knew, the currency transaction was completed, in whole or in part, for other persons and entities, including but not limited to Ron Caston. It is further alleged that the offense set forth in this paragraph was committed by the defendant herein as part of a pattern of illegal activity involving more than one hundred thousand dollars $100,000) within a twelve month period, which pattern of illegal activity is set forth in paragraphs 3 through

8 above, which are hereby adopted and incorporated as if fully set forth herein.

All in violation of Title 31, United States Code, Sections 5313(a), 5322(b) and 5324(2); Title 18, United States Code, Section 2; and 31 CFR Sections 103.22, 103.26 and 103.27.

COUNT V

13. On or about April 16, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER,

did unlawfully, knowingly and willfully, for the purpose of evading the reporting requirements of Section 5313(a) of Title 31 of the United States Code, by the means and in the manner set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set forth herein, structure and assist in structuring a transaction with two domestic financial institutions, to wit, the First Union National Bank of Florida, Pompano Beach, Florida and Barnett Bank, Ft. Lauderdale, Florida, in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, forty thousand dollars ($40,000). It is further alleged that the offense set forth in this paragraph was committed by the defendant herein as part of a pattern of illegal activity involving more than one hundred thousand dollars ($100,000) within a twelve month period, which pattern of illegal activity is set forth in paragraphs 3 through 8 above.

All in violation of Title 31, United States Code, Sections 5322(b) and 5324(3); and Title 18, United States Code, Section 2.

COUNT VI

14. On or about April 16, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER,

in a matter within the jurisdiction of the Internal Revenue Service, an agency of the United States, did knowingly and willfully conceal and cover up material facts by a trick, scheme and device, and make false, fraudulent and fictitious statements and representations as to material facts, in that, by the means and in the manner set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set forth herein, the defendants caused and attempted to cause a domestic financial institution, to wit, the First Union National Bank of Florida, Pompano Beach, Florida, to file a Currency Transaction Report with the Internal Revenue Service (I.R.S. Form 4789) for a currency transaction in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, forty thousand dollars ($40,000), which (a) omitted all references to other persons and entities for whom the transaction was completed, and (b) stated that the currency transaction was completed for James J. Belcher, P.A., and not, in whole or in part, for the true owner or owners of the currency; when, in truth and in fact, and as the defendant then and there well knew, the currency transaction was completed, in whole or in part, for other persons and entities, including but not limited to Ron Caston.

All in violation of Title 18, United States Code, Sections 1001 and 2.

COUNT VII

15. On or about April 29, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER,

did unlawfully, knowingly and willfully, for the purpose of evading the reporting requirements of Section 5313(a) of Title 31 of the United States Code, cause and attempt to cause a domestic financial institution, to wit, the First

Union National Bank of Florida, Pompano Beach, Florida, to file a Currency Transaction Report with the Internal Revenue Service (I.R.S. Form 4789) for a currency transaction in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars (10,000), to wit, forty thousand dollars ($40,000), which contained material omissions and misstatements of fact, namely, the Currency Transaction Report (a) omitted all reference to other persons and entities for whom the transaction was completed, and (b) stated that the currency transaction was completed for James J. Belcher, P.A. and not, in whole or in part, for the true owner or owners of the currency; when, in truth and in fact, and as the defendant then and there well knew, the currency transaction was completed, in whole or in part, for other persons and entities, including but not limited to Ron Caston. It is further alleged that the offense set forth in this paragraph was committed by the defendant herein as part of a pattern of illegal activity involving more than one hundred thousand dollars ($100,000) within a twelve month period, which pattern of illegal activity is set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set forth herein.

All in violation of Title 31, United States Code, Sections 5313(a), 5322(b) and 5324(2); Title 18, United States Code, Section 2; and 31 CFR Sections 103.22, 103.26 and 103.27.

COUNT VIII

16. On or about April 29, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER, -

did unlawfully, knowingly and willfully, for the purpose of evading the reporting requirements of Section 5313(a) of Title 31 of the United States Code, by the means and in the manner set forth in paragraph 3 through

8 above, which are hereby adopted and incorporated as if fully set forth herein, structure and assist in structuring a transaction with two domestic financial institutions, to wit, the First Union National Bank of Florida, Pompano Beach, Florida and Barnett Bank, Ft. Lauderdale, Florida, in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, forty thousand dollars ($40,000). It is further alleged that the offense set forth in this paragraph was committed by the defendant herein as part of a pattern of illegal activity involving more than one hundred thousand dollars ($100,000) within a twelve month period, which pattern of illegal activity is set forth in paragraphs 3 through 8 above.

All in violation of Title 31, United States Code, Sections 5322(b) and 5324(3); and Title 18 United States Code, Section 2.

COUNT IX

17. On or about April 29, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER,

in a matter within the jurisdiction of the Internal Revenue Service, an agency of the United States, did knowingly and willfully conceal and cover up material facts by a trick, scheme and device, and make false, fraudulent and fictitious statements and representations as to material facts, in that, by the means and in the manner set forth in paragraphs 3 through 8 above, which are hereby adopted and inrorporated as if fully set forth herein, the defendant caused and attempted to cause a domestic financial institution, to wit, the First Union National Bank of Florida, Pompano Beach, Florida, to file a Currency Transaction Report with the Internal Revenue Service (I.R.S. Form 4789) for a currency transaction in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand

dollars ($10,000), to wit, forty thousand dollars ($40,-000), which (a) omitted all reference to other persons and entities for whom the transaction was completed, and (b) stated that the currency transaction was completed for James J. Belcher, P.A., and not, in whole or in part, for the true owner or owners of the currency; when, in truth and in fact, and as the defendant then and there well knew, the currency transaction was completed, in whole or in part, for other persons and entities, including but not limited to Ron Caston.

All in violation of Title 18, United States Code, Sections 1001 and 2.

COUNT X

18. On or about June 3, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER,

did unlawfully, knowingly and willfully, for the purpose of evading the reporting requirements of Section 5313(a) of Title 31 of the United States Code, cause and attempt to cause a domestic financial institution, to wit, the First Union National Bank of Florida, Pompano Beach, Florida to file a Currency Transaction Report with the Internal Revenue Service (I.R.S. Form 4789) for a currency transaction in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, fifty thousand dollars (50,000), which contained material omissions and misstatements of fact, namely, the Currency Transaction Report (a) omitted all reference to other persons and entities for whom the transaction was completed, and (b) stated that the currency transaction was completed for James J. Belcher, P.A. and not, in whole or in part, for the true owner or owners of the currency; when, in truth and in fact, and as the defendant then and there well knew, the currency transaction was completed, in whole or in part, for other persons and entities, in-

cluding but not limited to Ron Caston. It is further alleged that the offense set forth in this paragraph was committed by the defendant herein as part of a pattern of illegal activity involving more than one hundred thousand dollars ($100,000) within a twelve month period, which pattern of illegal activity is set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set forth herein.

All in violation of Title 31, United States Code, Sections 5313(a), 5322(b) and 5324(2); Title 18, United States Code, Section 2; and 31 CFR 103.22, 103.26 and 103.27.

COUNT XI

19. On or about June 3, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER

did unlawfully, knowingly and willfully, for the purpose of evading the reporting requirement of Section 5313(a) of Title 31 of the United States Code, by the means and in the manner set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set fother here, structure and assist in structuring a transaction with two domestic financial institutions, to wit, the First Union National Bank, Fort Lauderdale, Florida, in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, fifty thousand dollars ($50,000). It is further alleged that the offense set forth in this paragraph was committed by the defendant herein as part of a pattern of illegal activity involving more than one hundred thousand dollars ($100,000) within a twelve month period, which pattern of illegal activity is set forth in paragraphs 3 through 8 above.

All in violation of Title 31, United States Code, Sections 5322(b) and 5324(3); and Title 18, United States Code, Section 2.

COUNT XII

20. On or about June 3, 1987, in Broward County, in the Southern District of Florida, the defendant,

JAMES J. BELCHER

in a matter within the jurisdiction of the Internal Revenue Service, an agency of the United States, did knowingly and willfully conceal and cover up material facts by a trick, scheme and device, and make false, fraudulent and fictitious statements and representations as to material facts, in that, by the means and in the manner set forth in paragraphs 3 through 8 above, which are hereby adopted and incorporated as if fully set forth herein, the defendant caused and attempted to cause a domestic financial institution, to wit, the First Union National Bank of Florida, Pompano Beach, Florida, to file a Currency Transaction Report with the Internal Revenue Service (I.R.S. Form 4789) for a currency transaction in connection with a receipt, exchange and transfer of a sum of United States currency in excess of ten thousand dollars ($10,000), to wit, fifty thousand dollars ($50,000), which (a) omitted all reference to other persons and entities for which the transaction was completed, and (b) stated that the currency transaction was completed for James J. Belcher, P.A., and not, in whole or in part, for the true owner or owners of the currency; when, in truth and in fact, and as the defendant then and there well knew, the currency transaction was completed, in whole or in part, for other persons and entitites, including but not limited to Ron Caston.

All in violation of Title 18, United States Code, Sections 1001 and 2.

A TRUE BILL

_____

Foreperson

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
United States Attorney

/s/ David F. Axelrod
DAVID F. AXELROD
Assistant U.S. Attorney

(2)

No. 91-22

FILED
AUG 12 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMES J. BELCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-22

JAMES J. BELCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the dismissal of the indictment against him; he argues that the indictment fails to charge a criminal offense.

1. On February 23, 1989, petitioner was indicted by a grand jury sitting in the United States District Court for the Southern District of Florida. He was charged in four counts with causing a domestic financial institution to file currency transaction reports (CTRs) containing material omissions or misstatements of fact, in violation of 31 U.S.C. 5324(2); in four counts with using material omissions or misstatements to cause a domestic financial institution to file incom-

plete and false CTRs, in violation of 18 U.S.C. 1001; and in four counts with structuring currency transactions for the purpose of evading reporting requirements, in violation of 5324(3).

On October 20, 1989, the district court dismissed the indictment on the ground that it failed to charge a criminal offense. The court held that 31 U.S.C. 5313 imposes reporting requirements only on financial institutions, and does not require customers to structure their transactions so as to trigger the reporting requirements. Pet. App. 13a-15a.

The court of appeals reversed. Pet. App. 1a-12a. The court noted that, contrary to the district court's assumption, petitioner was not charged with the failure to file, or filing, false CTRs. Rather, he was charged with causing a financial institution to file false CTRs. *Id.* at 4a n.7. Addressing the issue whether that allegation charges a criminal offense, the court held that Section 5313 and its implementing regulations impose a duty on financial institutions to disclose the real party in interest in reportable currency transactions; that the indictment charges that petitioner deliberately concealed the source of his funds and caused the banks to file false CTRs; and that, if the allegations of the indictment are established, petitioner would be subject to criminal liability on each count of the indictment. *Id.* at 5a-12a.

2. Petitioner contends (Pet. 7-8) that the Bank Secrecy Act, 31 U.S.C. 5313-5326, and the applicable regulations do not proscribe the conduct charged in the indictment. Whatever the merits of petitioner's contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to

dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the court requests.

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